Qwest
1020 Nineteenth Street NW, Suite 700
Washington, DC 20036
Phone 202.429.3121
Fax 202.293.0561

Cronan O'Connell
Vice President-Federal Regulatory

EX PARTE

February 13, 2003

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street S.W., TW-A325
Washington, DC 20554

RE: CC Docket Nos. 01-338, 96-98 and 98-147, In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability

Dear Ms. Dortch:

A critical issue in this proceeding is the impact of unbundling requirements on the incentives of CLECs and ILECs to invest in facilities, including facilities that will be used to provide advanced services.[1] The purpose of this letter is to underscore the importance to preserving these incentives of including in the Commission's Order an express statement that laws and regulations adopted under the authority of state law are expressly preempted by the Commission's determinations not to require the unbundling of new or other facilities used to provide advanced services.

A pending proceeding in Minnesota illustrates the need for an express statement of preemption. By way of background, in the Minnesota section 271 proceeding and a recent cost docket, CLECs and the Minnesota Department of Commerce argued that the PUC should require Qwest to provide at cost-based rates unbundled packet switching and several other broadband features and a variety of DSL not currently provided in the Qwest network.

Of course, in its UNE Remand decision, the Commission refused to require the unbundling of packet switching, except in very limited circumstances when four preconditions are met. In reaching that result, the Commission reasoned as follows:

> Despite the encouraging signs of investment in facilities used to provide advanced services described above, we are mindful that regulatory action should not alter the successful deployment of advanced services that has occurred to date. Our decision to decline to unbundle packet switching therefore reflects our concern that we not stifle burgeoning competition in the advanced service market. We are mindful that, in such a dynamic and evolving market, regulatory restraint on our part may be the most prudent course of action in order to further the Act's goal of encouraging facilities-based investment and innovation.[2]

---

[1] *See, e.g.,* Remarks by Commissioner Kevin J. Martin, 20th Annual PLI/FCBA Telecom Conference, December 12, 2002.

[2] Third Report and Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 99-238, 15 FCC Rcd 3696 (rel. Nov. 5, 1999), ¶ 316.

Nevertheless, in Minnesota, the parties are arguing that the PUC may ignore the Commission's Order, and add "under the authority of state law" an unbundling requirement that the Commission has determined would undermine the goals of the Act. The CLECs asked the PUC to open another docket to consider a new more expansive unbundled packet switching offering, which ignores the FCC's four preconditions and includes features not found on the Qwest network. The PUC's ALJ found that the FCC had preempted further discussion on this subject, but the PUC overruled the ALJ and opened a new docket to determine whether Qwest should be required to provide unbundled packet switching without regard to the four preconditions and be required to include features not currently found in Qwest' network.

Because a state law or regulation that imposes an unbundling requirement has the same impact on the incentives for investment and the prospects for facilities-based competition as a similar requirement imposed by or under the authority of federal law, any unbundling requirement rejected by the Commission in order to preserve incentives for investment in facilities would be inconsistent with federal law, and thus preempted.[3] The proceeding in Minnesota illustrates not only the need for preemption, but why the preemptive effects of the Commission's unbundling determinations should be made explicit in the Commission's Order. In the Minnesota proceeding, Qwest argued based on the discussion in the UNE Remand Order quoted above that a state law obligation to provide unbundled packet switching was inconsistent with federal law and thus preempted. But other parties argued, and the ALJ apparently agreed, that absent an express statement of preemption, states remain free to adopt requirements rejected by the Commission. The ALJ states:

> AT&T is correct that the Commission could exercise its authority, under either section 251 of the Act or its independent state authority to require something different.[4]

Although Qwest could challenge in federal court any final determination by the PUC to require unbundled packet switching, such litigation could be avoided if the Commission were to make absolutely clear the preemptive effects of its Order.

In accordance with Commission Rule 47 C.F.R. §1.49(f), this *Ex Parte* is being filed electronically via the Commission's Electronic Comment Filing System for inclusion in the public record of the above-referenced proceedings pursuant to Commission Rule 47 C.F.R. §1.1206(b)(1).

Sincerely,
/s/
Cronan O'Connell

cc: Simon Wilkie (swilkie@fcc.gov)
Donald Stockdale (dstockda@fcc.gov)

---

[3] Letter from R. Steven Davis, Qwest, et al., to Michael K. Powell, Chairman, FCC (Nov. 19, 2002).

[4] Findings of Fact, Conclusions of Law and Recommendations, *In the Matter of a Commission Investigation into Qwest's Compliance with Section 271(c)(2)(B) of the Telecommunications Act of 1996; Checklist items 1, 2, 4, 5, 6, 11, 13, and 14*, before the Minnesota Public Utilities Commission, PUC Docket No. P-421/CI-01-1371 (Jan. 24, 2003), ¶157.